Supreme Court, U.S.
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No. 00-684

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, and on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, and on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit correctly determined, following relevant Supreme Court precedent and circuit court decisions, that Petitioners lacked standing to bring a claim under the Clean Water Act ("CWA").

2. The United States Court of Appeals for the Fifth Circuit's ruling affirming the district court's decision that Petitioners failed to state a cause of action under the Resource Conservation & Recovery Act ("RCRA") and in finding that the district court did not abuse its discretion in not allowing their alternative motion to amend Petitioners' pleadings, is not in conflict with the decisions of this Court as to the requirements for stating a claim upon which relief can be granted or as to the factors for deciding motions to amend pleadings.

3. Even if The United States Court of Appeals for the Fifth Circuit did not address Petitioners' claim that portions of their summary judgment evidence was not considered, Petitioners failed to adequately preserve the issue in the Fifth Circuit by showing how consideration of that evidence, in proper form and with proper references, would have resulted in a showing sufficient to defeat Respondent's motion for summary judgment, and such a claim does not fall within this Court's rules for determining whether a particular question justifies granting a writ of certiorari.

QUESTIONS PRESENTED – Continued

4. The issue of preemption was not addressed by the United States Court of Appeals for the Fifth Circuit or the district court because Respondent never argued that state law bestowed immunity upon it as to Petitioners' Federal claim under the CWA, which was resolved by finding that Petitioners lacked standing to bring a claim, and this Court's decisions as to preemption are therefore not relevant.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Dallas, Texas ("Respondent") files this Respondent's Brief in Opposition ("Response") to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), asking the Court to deny the Petition to review the opinion issued July 6, 2000 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondent respectfully shows the Court as follows:

STATEMENT OF JURISDICTION

The statutory basis for jurisdiction of this Court is 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Petitioner's statement regarding the course of proceedings and disposition in the trial court (Petition at 2) is substantially correct, as far as what is stated. For the sake of accuracy and completeness, however, Respondent provides the following regarding the proceedings as they apply to this Petition.[1]

[1] For ease of reference and because the record on appeal had not been filed in the Fifth Circuit Court of Appeals at the

Petitioners filed this lawsuit in the United States District Court for the Northern District of Texas on October 30, 1995, for personal injuries and property damage they allegedly suffered as a result of sewage backup into the house they were renting. (D.R. at 151-154.) They sued Respondent under the United States Constitution (the Takings, Equal Protection and Due Process Clauses), the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Texas Constitution, Article I, §§ 13, 17, and 19 (Takings, Open Courts and Due Course of Law provisions); The Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (West 1997); the Texas Water Code Ann. § 26.121 (West 1988); the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.011-361.613 (West 1992 & Supp. 1997); the federal Declaratory Judgment Act, 28 U.S.C. § 2201; Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (West 1997); and various other state laws (including common law nuisance, nuisance per se, trespass and conversion). (D.R. at 141-267.) Respondent timely filed its answer in this cause on December 29, 1995. (*See* district court's docket, at entry no. 8.)

On February 11, 1997 Respondent filed its motion for summary judgment on several bases: that Petitioners

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time Respondent's Fifth Circuit brief was due, nor was it used as a reference by the parties or the Fifth Circuit at the time of oral argument, Respondent will make record references ("Designated Record" or "D.R.") throughout this Response by referring to the documents which were Bates-stamped and attached to Defendant-Appellee's Motion To Designate Record On Appeal, filed in the Fifth Circuit Court of Appeals on or about December 3, 1998.

could not establish the existence of the essential elements of each of their claims, that they did not have standing to bring private claims pursuant to the Clean Water Act and for alleged violations of Respondent's National Pollutant Discharge Elimination System ("NPDES") permits, that their Fourteenth Amendment claims were not actionable, that they did not have a private right of action under the Texas Water Code or Texas Solid Waste Disposal Act, that Respondent had sovereign immunity under the Texas Tort Claims Act for state-law tort claims, and that Petitioners' claims were not the appropriate subject for relief under the Texas and federal Declaratory Judgment Acts. (D.R. at 1-140.)

On April 18, 1997 while Respondent's summary judgment motion was pending, Petitioners filed their Third Amended Complaint, alleging a violation of the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. § 6972, not as a separate action "per se . . . but rather . . . as an alternative standard to aid in proving up plaintiffs' Clean Water Act-related and nuisance-related cause of action . . . " (D.R. at 215-222.) On April 25, 1997, Respondent filed its first amended answer to Petitioners' Third Amended Complaint.

After considering the motion and response, the district court issued a memorandum order on October 14, 1997, granting Respondent's motion in part and denying it in part. (D.R. 308-319.) This opinion was later vacated and substituted by the district court's memorandum opinion and order, dated April 16, 1998. (D.R. 507-519.) In its memorandum opinion and order, the district court dismissed the majority of Petitioners' claims, including

their claim under the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365. (D.R. 507-524.)

On October 25, 1997, Petitioners filed a motion to reconsider the partial summary judgment ruling of October 14, 1997. (D.R. 329-361.) The district court granted Petitioners' motion only as to its state-law takings claim based on non-negligent nuisance and directed Respondent to file a response specifically addressing this issue. (D.R. 369-370.) On December 9, 1997 Respondent filed its response. (D.R. 372-415.)

On October 30, 1997 the district court granted Respondent's motion for leave to file a supplemental motion for summary judgment (D.R. 371), and on December 15, 1997 Respondent filed its supplemental motion for summary judgment and brief on Petitioners' remaining claims, including their putative claim for recovery pursuant to the RCRA. (D.R. 416-495.)

After considering the supplemental motion and response, the district court issued a memorandum opinion and order on May 12, 1998, granting Respondent's supplemental motion for summary judgment on Petitioners' remaining claims and dismissing Petitioners' purported RCRA claim as unpleaded. (D.R. 520-524.)

On May 22, 1998, more than two and one-half years after filing this action and after three previous amendments to their pleadings, Petitioners filed their Rule 15 motion to amend their pleadings to include a RCRA claim. The district court, however, entered final judgment on May 27, 1998, dismissing with prejudice Petitioners' entire action against Respondent. (D.R. 525.)

On June 25, 1998 Petitioners perfected their appeal to the Fifth Circuit. (D.R. 526-528.) The district court's judgment was affirmed on July 6, 2000,[2] and rehearing was denied on August 3, 2000.

B. Statement of Facts

On October 31, 1993 Respondent's Water Utilities Department received an emergency call concerning a stopped sewer main and flooded residence at 5510 Williamstown in Dallas, Texas. (D.R. 17-19, 427-430.) A crew responded and unstopped the sewer main and determined the cause of the backup and flooding to be tree root intrusion into the sewer line. (*Id.*)

Petitioners, who rented the residence at 5509 Melshire, across the alleyway from 5510 Williamstown, returned home approximately thirty minutes after the emergency call. (D.R. 152.) They found that their sewer line was also backed up and had flooded their home. (*Id.*) An employee of Respondent reported to Petitioners' home and asked whether their house was flooded with sewage. (D.R. 153.) Petitioners' lateral sewer line clean-out cap, which was located in their backyard, was removed to relieve the flooding of sewage into their home. (*Id.*) As a result of removing this cap, some of the sewage runoff from Petitioners' yard may have flowed into a nearby storm drain. The response crew dispatched

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[2] The Fifth Circuit's opinion is not a published opinion; and therefore, it has no precedential value. This fact should weigh in favor of denying the Petition because even if the Fifth Circuit's ruling is incorrect, it will not be cited as authority.

by Respondent determined that the same tree root intrusion into the sewer line was the cause of the backup and flooding at both residences. (D.R. 18, 428.) A subsequent cleaning and video inspection performed on the sewer main in question confirmed that the same tree root intrusion had been the cause of the backups and flooding at both residences. (*Id.*) This video inspection did not reveal any structural problems with the sanitary sewer main which could cause a backup in the sanitary sewer lines. (D.R. 428.)

Respondent's sanitary sewer system and storm drain system are completely separate systems and operate separately. (D.R. 19, 429.) The sanitary sewer system does not operate by motor-driven equipment, but flows by the principles of gravity. (*Id.*)

There is no sanitary sewer lift station located between the residences on Williamstown and Melshire and there is no lift station located upstream from those residences. (D.R. 20-21.) A thorough search of the records concerning reports of sewer lift stations revealed that there were no malfunctions or problems during the entire months of October and November 1993, and specifically, on October 31, 1993. (*Id.*) Even if there had been a malfunction of a sewer lift station on October 31, 1993, it was physically impossible for any such malfunction to have affected, in any way, the providing of sanitary sewer service to the Williamstown and Melshire residences, or cause any sewer stoppage, sewer backup or "pressurized-like" sewage flow into or outside of Petitioners' residence. (*Id.*)

There are only two wastewater treatment plants for Respondent – the Central Wastewater Treatment Plant and the Southside Wastewater Treatment Plant. (D.R. 22-23.) A thorough search of the records for both treatment plants revealed that there were no malfunctions or problems of any kind during the entire months of October and November 1993 and, specifically, on October 31, 1993, which would cause a sewer backup or sewage flooding. (*Id.*)

A thorough search of Respondent's Water Utilities Department trouble order/service history records from 1987 through 1996 indicated that there were no reported problems concerning any sewer stoppages, sewer backups, or sewer flooding for any of the residences on Melshire and Williamstown serviced by the sewer main in question, other than the backups and flooding that occurred at 5509 Melshire and 5510 Williamstown on October 31, 1993. (D.R. 18-19, 428-429.) More importantly, there have been no instances of sewage flowing out of anyone's home and into a storm drain, specifically in this area, and no such problems are likely to reoccur. (D.R. 25.)

There is no requirement pursuant to Respondent's NPDES permits, the Clean Water Act, or any other law, which requires Respondent to report the specific contents of the sewage which flooded Petitioners' residence to Petitioners, the Environmental Protection Agency ("EPA") or the Texas Natural Resource Conservation Commission ("TNRCC"). (D.R. 18.)

Respondent's "Bud Holcomb" map, which shows sewer drainage areas, streets by name, lots and block

numbers, sizes of sewer mains and flow directions that serve within the drainage basin, reflects that there is no hospital or any other industrial user located upstream on the sewer line in the drainage basin where 5509 Melshire is located. (D.R. 429-430.) The type of sewage that entered Petitioners' residence is domestic sewage because it originated only from residences or retail businesses. (D.R. 430.) Furthermore, Respondent's sanitary sewer system is a system which is owned by a municipality and used in the treatment of municipal sewage; therefore, it is a Publicly-Owned Treatment Works ("POTW"). (D.R. 430.)

Neither Respondent nor any of its employees modified the sewer system's flow dynamics just before the backup occurred at Petitioners' residence. (D.R. 430.) Respondent did not intentionally flood Petitioners' residence with sewage, nor did it intend to cause or take any affirmative action to cause the flooding of the Petitioners' residence. (*Id.*)

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

A. The Standards for Review Have Not Been Met by Petitioners

Petitioners request this Court to review the Fifth Circuit's opinion affirming the district court's rulings granting Respondent's motion for summary judgment and supplemental motion for summary judgment. (Petition at 2.) Petitioners assert that the Court's discretionary review powers are appropriately invoked because the Fifth Circuit's opinion either ignored or conflicts with this Court's decisions, and is in conflict with other circuit

courts' decisions. (*See* Petition.) Petitioners' contentions are without merit, and the Court should deny discretionary review in this matter pursuant to Supreme Court Rule 10, which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > . . .
> >
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Court has held that the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioners' failure to satisfy this standard should necessarily result in the Court's denial of their Petition.

B. The United States Court of Appeals for the Fifth Circuit Correctly Determined, Following Relevant Supreme Court Precedent and Circuit Court Decisions, that Petitioners Lacked Standing to Bring A Claim Under the Clean Water Act ("CWA")

Petitioners contend that the Fifth Circuit incorrectly applied Article III standing requirements in conflict with this Court's opinion in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), when it determined that Petitioners lacked standing to bring a claim under the CWA. (Petition at 4-17.) Specifically, Petitioners argue that the Fifth Circuit narrowly applied "its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 350 (5th Cir. 1996)" to deny them Article III standing because it focused on "injury to the environment" instead of "injury to the plaintiff". (Petition at 8-9.) Petitioners' contentions are wholly without merit. First, the standing test relied upon by the Fifth Circuit in this case and in *Crown Central Petroleum* was not merely the Fifth Circuit's rule, but a rule of law set forth by this Court in its opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) and followed by the Court in *Laidlaw*. (*See* Fifth Circuit opinion, Appendix to Petition at

A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-25).) In accordance with *Lujan*, for a plaintiff to have constitutional standing, he must show: (1) that he personally has suffered some actual or threatened injury, (2) that the injury is fairly traceable to the defendant's actions, and (3) his injuries are likely to be redressed by a favorable decision. (*Id.*)

Second, the Fifth Circuit did not base its opinion on Petitioners' lack of evidence under the "injury prong" of the standing test, but rather on their failure to allege and prove their injuries were "fairly traceable" to Respondent's actions. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-25, 26).) This Court's recent opinion in *Laidlaw* addresses the "injury in fact" prong of its standing test set forth in *Lujan*, not the "fairly traceable" prong which was the basis of the Fifth Circuit's opinion in this case in determining that Petitioners lacked standing. *See Laidlaw*, 120 S. Ct. at 704-705.

The Fifth Circuit affirmed the trial court's finding that Petitioners failed to meet the requirement that their alleged injuries be "fairly traceable" to any discharge violation by Respondent and correctly held that Petitioners lacked constitutional standing to bring a citizen suit under the CWA. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion).) To determine whether in a citizen suit under the CWA an injury is "fairly traceable" to a defendant's discharges, the plaintiff must demonstrate that a defendant has:

> (1) discharged some pollutant in concentrations greater than allowed by its permit;
>
> (2) **into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant** and that
>
> (3) the discharge of this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

(Emphasis added.) *Crown Central Petroleum Corp.*, 95 F.3d at 360-61 (citing *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)).

Specifically, the district court found, and the Fifth Circuit upheld, that Petitioners failed to meet the second prong of the three-part "fairly traceable" test: that a discharge occurred into a waterway in which the Petitioners had an interest that was or may be adversely affected. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-26, (citing *Crown Central Petroleum Corp.*, 95 F.3d at 360-61)).) The Fifth Circuit found that Petitioners failed to adduce any evidence to show that they had an interest in the Trinity River, which was the relevant waterway in this case. Thus, the court found that Petitioners failed to raise a genuine issue of material fact on this element of their claim. Consequently, the court held Petitioners lacked standing to assert a violation under the CWA.

Petitioners argue, however, that their allegations of injury caused by an NPDES permit violation is sufficient to grant them standing to sue under the CWA. (Petition,

at 14-15.) In support of their claim, Petitioners argue that their injury is "directly related to at least one of the twin concerns of the Clean Water Act and RCRA: *'human health'* and *'the environment'*) [sic]." (*Id.* at 14.)

The purpose of the CWA is the protection of the nation's waters. 33 U.S.C. § 1251(a). Specifically, the provision that Petitioners wish to enforce prohibits the unauthorized discharge of any pollutant into navigable waters from any point source. 33 U.S.C. §§ 1311, 1342(a), 1362(7), 1362(12). Petitioners presented no evidence, however, that their alleged "human health" injuries were caused by a discharge of a pollutant into a waterway, the Trinity River, in which they had an interest. In fact, Petitioners' evidence showed that their alleged injuries were personal and completely unrelated to the Trinity River. Their evidence showed that their alleged injuries occurred, if at all, when the sewage flowed into their home and onto their persons and property, not when it later ran off their property and possibly flowed into a nearby storm drain.

The Fifth Circuit did not misapply the rule of law applicable to Article III standing under the CWA and has not decided this issue in a way that conflicts with this Court's decisions in *Lujan* or *Laidlaw*. Thus, Petitioners have failed to meet the standard for review on this issue.

C. The United States Court of Appeals for the Fifth Circuit's Ruling Affirming the District Court's Decision That Petitioners Failed to State a Cause of Action Under the Resource Conservation & Recovery Act ("RCRA") and Finding That the District Court Did Not Abuse its Discretion in Not Allowing Petitioners' Alternative Motion To Amend Their Pleadings, is Not in Conflict With the Decisions of This Court As to the Requirements For Stating a Claim Upon Which Relief Can Be Granted or As to the Factors For Deciding Motions to Amend Pleadings

Petitioners contend that the Fifth Circuit's opinion affirming the district court's determination that Petitioners failed to state a claim under RCRA is in conflict with this Court's decision in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). (Petition at 17-21.) Petitioners' contentions are without merit. There is no conflict because this Court's decision in *Conley* is not relevant to a determination of Petitioners' failure to state a claim under RCRA. In their third amended complaint, Petitioners asserted that they were not pleading RCRA as a separate cause of action, but were intending to utilize the RCRA

> to aid in proving up plaintiffs' Clean Water Act-related and nuisance-related causes of action (inter alia), by showing one or more statutory standard violations – so that the Clean Water Act and/or RCRA statutory violations "convert" the plaintiffs' *common law nuisance* claims into . . . *nuisance per se* claims."

(D.R. 221.) Therefore, the district court correctly ruled that Petitioners failed to allege a separate RCRA cause of

action, and the Fifth Circuit was correct in affirming the district court's decision.

Petitioners also complain that the Fifth Circuit improperly found that the district court did not abuse its discretion in denying their motion for leave to amend their pleadings a fourth time to add a RCRA cause of action, which Petitioners incorrectly claim is in conflict with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962). (Petition at 18.) The Fifth Circuit's opinion, however, does not conflict with this Court's decision in *Foman* which recognizes that the district court has discretion in determining whether to grant a party leave to amend his pleadings. *See Foman*, 371 U.S. at 182.

The district court's ruling denying Petitioners the opportunity to amend their pleadings is reviewed by the circuit court for an abuse of discretion standard. *Moody v. FMC Corp.*, 995 F.2d 63, 65 (5th Cir. 1993). Fed. R. Civ. P. 15 provides that leave or permission to amend a pleading "shall be freely given when justice so requires." The trial court, however, has broad discretion in determining whether to grant a party leave to amend his pleadings. *Foman*, 371 U.S. at 182; *Moody v. FMC Corp.*, 995 F.2d at 65. In making this decision the court may consider (1) undue prejudice to the opposing party, (2) whether the movant unduly delayed the request, (3) whether it was offered in good faith, and (4) the futility of the amendment. *See Foman v. Davis*, 371 U.S. at 192; *Moody*, 994 F.2d at 66.

Leave to amend after a final summary judgment is allowed only in limited circumstances. Vol. 3, James W. Moore et al., Moore's Federal Practice, § 15.12[3], (3d ed. 1998) at 22. The value of a summary judgment motion is

lost if parties are allowed to test one theory at a time by obtaining consecutive leaves to amend. *Id.; see also Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-470 (5th Cir. 1967) (plaintiff had fair opportunity, but failed to present adequate claim earlier in proceeding). A party should have an opportunity to establish a case; however, courts should also consider that litigation should have a timely conclusion. Moore's Federal Practice, § 15.12[3] at 23; *see also Union Planters Nat'l Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) (court did not abuse discretion in denying leave to amend when plaintiff attempted to amend for second time after summary judgment granted).

In circumstances where a summary judgment motion is pending, one of the factors a court may consider in determining whether to grant leave to amend or supplement is the futility of the proposed additional claims. Moore's Federal Practice, § 15.12[3] at 23; *see also Foman*, 371 U.S. at 182.

The district court did not abuse its discretion by effectively denying Petitioners' motion to amend their complaint a fourth time or file a "RCRA-related" supplement to their Third Amended Complaint. Petitioners judicially admitted in their Third Amended Complaint that they were not alleging a separate RCRA cause of action. (D.R. 221.) Moreover, they did not file their Rule 15 motion until ten (10) days after the district court ruled on Respondent's supplemental motion for summary judgment, and such ruling effectively dismissed all of their claims against Respondent. (D.R. 520-524.)

At the time Petitioners filed their Rule 15 motion, this case had been pending for two and one-half years and Petitioners had amended their complaint on three prior occasions. Thus, Petitioners had a fair opportunity to present their claim under the RCRA statute and failed to do so. Furthermore, legal authority supports that no private cause of action for damages due to personal injury is expressly created by RCRA, and none is impliedly created. *Polcha v. AT & T Naussau Metals Corp.*, 837 F.Supp. 94 (M.D.Pa. 1993); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). Therefore, Petitioners' proposed RCRA claim was futile. Given the circumstances of this case, the Fifth Circuit's holding that the district court did not abuse its discretion when it denied Petitioners the opportunity to amend their pleadings and allow Petitioners "a fifth bite at the apple" to plead a futile claim does not conflict with the decisions of this Court in *Conley* or *Foman*.

D. Even if The United States Court of Appeals for the Fifth Circuit Did Not Address Petitioners' Claim That Portions of Their Summary Judgment Evidence Was Not Considered, Petitioners Failed to Adequately Preserve the Issue in the Fifth Circuit By Showing How Consideration of That Evidence, in Proper Form and With Proper References, Would Have Resulted in a Showing Sufficient to Defeat Respondent's Motion For Summary Judgment, and Such a Claim Does Not Fall Within This Court's Rules for Determining Whether a Particular Question Justifies Granting a Writ of Certiorari

Petitioners allege that the Fifth Circuit's implicit affirmance of the district court's decision not to sift

through the record in search of evidence to support their opposition to summary judgment is in conflict with this Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). (Petition at 22-23.) Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate in any kind of action

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at 322. The plain language of Rule 56(c) mandates the entry of a summary judgment against a party "who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. Once the moving party establishes his entitlement to summary judgment, the burden shifts, and the non-moving party must come forward with specific facts showing that there is a genuine issue for trial and may not rest upon the mere allegations or denials of his pleadings. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

To withstand a motion for summary judgment, the non-movant's response, by affidavits or as otherwise provided in Rule 56(e), must set forth specific facts creating genuine issues precluding summary judgment. *Celotex Corp.*, 477 U.S. at 322-323. The court of appeals' review of the record is plenary. *International Shortstop, Inc. v. Rally's,*

939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). A court of appeals reviews a grant of summary judgment *de novo* by applying the same standard as the court below was required to apply. *See King v. Chide*, 974 F.2d 653, 655 (5th Cir. 1992).

It was within the court's discretion, however, to consider evidence that Petitioners failed to point out to the court in their summary judgment briefing. *Copsey v. Swearingen*, 36 F.3d 1336, 1348 (5th Cir. 1994) (holding that district court had discretion to reconsider grant of summary judgment when party submitted evidence after court had ruled on motion) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173-75 (5th Cir. 1990)). The court's duty under Rule 56 with respect to its review of the evidence was aptly stated by the district court in its Memorandum Opinion and Order entered April 17, 1998: "Rule 56 does not impose a duty on the district court [or the court of appeals] to sift through the record in search of evidence to support a party's opposition to summary judgment." (*See district court opinion, Appendix to Petition at A-26* (citing *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citing *Jones v. Sheehan, Young, & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)).) Neither the district court nor the court of appeals has the obligation to consider evidence that the nonmovant does not bring forth in opposition to the summary judgment motion. *Doddy*, 101 F.3d at 463 (citing *Copsey*, 36 F.3d at 1347 n. 9 (5th Cir. 1994)). To satisfy their burden, nonmovants are required to identify specific evidence in the record, and to articulate the precise manner in which that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)

(citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992)).

The Fifth Circuit correctly applied the summary judgment standard set forth in *Celotex* with respect to the elements of Petitioners' claims. Neither the district court nor the Fifth Circuit had any duty pursuant to the holding in *Celotex* or Rule 56 to sift through the record in search of evidence to support Petitioners' opposition to summary judgment. Petitioners had the duty not only to appropriately identify specific evidence in the record, but to sufficiently demonstrate to the court how consideration of that evidence supported their claims to defeat summary judgment. By haphazardly listing points in their response to Respondent's motion, in their motion to reconsider and in their Fifth Circuit appellate brief, and by referring to previously filed documents not attached to their response, without showing the court how the evidence supported their claims, Petitioners failed to adduce competent summary judgment evidence to meet their burden and permit a reasonable trier of fact to find in their favor. Therefore, the district court did not abuse its discretion by not digging through the hundreds of pages of documents haphazardly listed by Petitioners, and the Fifth Circuit's opinion implicitly affirming the district court does not misapply the rule of law set forth in *Celotex*. Moreover, none of the circuit court decisions cited above or relied upon by the Fifth Circuit or the district court conflicts with this Court's opinion in *Celotex*.

E. The Issue of Preemption Was Not Addressed By the Fifth Circuit Court of Appeals or the District Court because Respondent Never Argued That State Law Bestowed Immunity Upon it as to Petitioners' Federal Claim Under the CWA, Which Was Resolved By Finding That Petitioners Lacked Standing to Bring a Claim, and this Court's Decisions as to Preemption are Therefore Not Relevant

Petitioners contend that the Fifth Circuit failed to consider the application of federal preemption under Article VI's Supremacy Clause, in conflict with this Court's holding in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405 (1924), when the Fifth Circuit affirmed the district court's ruling granting summary judgment in favor of Respondent. (Petition at 24-27.) Specifically, Petitioners argue that by not discussing the issue of federal preemption, the Fifth Circuit "negated the NPDES-rooted strict liability bases for the Janiks' claims under both Texas state statutory law (esp. The "TTCA") and Texas state Constitution (Texas' non-negligent "nuisance"/"damaging remedy"). (*Id.* at 24-25.) Apparently, Petitioners are contending that if the Fifth Circuit had considered the issue of preemption, then Petitioners could have proven state-law tort and takings claims simply by showing a violation of Respondent's NPDES permit. Petitioners' arguments are without any basis in law or fact and do not meet the standards for review by this Court.

Respondent has never alleged, as a basis for dismissal of Petitioners' federal claims, that it did not have to comply with its NPDES permit or that it was entitled to dismissal of Petitioners' Clean Water Act claim because

of governmental immunity under state law. Thus, preemption was never an issue or basis for the district court's grant of summary judgment in favor of Respondent and the Fifth Circuit's affirmance of that ruling, and any decisions by this Court on the issue of preemption are irrelevant to any consideration for certiorari review by this Court.

Petitioners have failed to cite to any authority in support of their argument that proof of an alleged violation of Respondent's NPDES permit establishes causes of action under state tort-law and state constitutional takings law. They have also failed to cite to any authority to support their contentions or demonstrate why the district court and the Fifth Circuit should not have separately analyzed each element of their causes of action in accordance with the laws applicable to each and the evidence, if any, provided in Petitioners' responses to the summary judgment motions.

CONCLUSION

None of the questions Petitioners present is of such precedential value to warrant review by this Court. Furthermore, there is no conflict among the circuits regarding any of the questions presented and there is no conflict with any relevant decisions of this Court. This case does not present any issue of federal law that needs to be settled by this Court. The Fifth Circuit and district court sufficiently reviewed the facts and applied correct legal standards in reaching their conclusions. For the reasons

stated herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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